Plaintiff's Opp. Mem. at 9. Trill holds a position as a Human Resources ("HR") Consultant, and Anderson has not presented any evidence that she and Trill have similar seniority, training, experience, qualifications, or supervisors.

(2) Legitimate, Non-discriminatory Reason, Pretext

WSRC argues that even if Anderson could establish her prima facie cases, she fails to show that its legitimate, non-discriminatory reasons for its actions are pretextual. Anderson argues that WSRC's reasons are pretextual because she was better qualified for the positions and because WSRC has failed to offer an explanation for not promoting her in her current position.

(a) December 1997 and January 1998 Promotion Claims

Even if Anderson could establish her prima facie cases, she fails to show that WSRC's legitimate, non-discriminatory reasons for not promoting Anderson to the January 1997 and January 1998 positions are pretextual. Anderson fails to show that the reasons asserted are false and as discussed above, she fails to show that the selected candidates were not better qualified than her for the specific jobs for which they were chosen.

(b) Current Position Promotion Claim

Even if Anderson could establish her prima facie case, she fails to show that WSRC's legitimate, non-discriminatory reasons for not promoting her in her

current position are pretextual. WSRC provides that Anderson was not promoted in her current job because she had not been there long enough, and that the company responded to her requests concerning a higher SGL, examined the positions, and found that the job did not merit a higher SGL.

Specifically, at the time Anderson's position was created, the Compensation section of the HR Department ("Compensation") reviewed a Position Analysis Questionnaire ("PAQ") and recommended an SGL of 28. Debra Muehlfeld Aff., Para 5, Exs. 1-2. In 1999, the Site's EEO office asked Compensation to evaluate Anderson's position. Muehlfeld Aff., Para. 6; Charles Hinton Aff., Para 5. Because the actual responsibilities of the position had decreased and changed from the projected responsibilities, Compensation found that the position merited an SGL of 26, but WSRC allowed Anderson to remain at SGL 28 without altering her responsibilities. Hinton Aff., Para 6, Ex. 3; Muehlfeld Aff., Para. 6-7, Ex. 6-7.

In 2001, Anderson's manager, Mel Buckner, proposed an increased SGL for her, but Compensation reviewed the PAQ submitted by Buckner and determined the position only merited an SGL 28. Dobyns Aff., Para. 5, Exs. 1-2; Hinton Aff., Para. 7; Muehlfeld Aff., Para 8, Exs. 8-10. Buckner tried to increase Anderson's responsibilities and submitted two more PAQs. Muehlfeld Aff., Para. 10, Exs. 12-14; Hinton Aff., Para 8, Exs. 4 and 6; Dobyns Aff., Para, 5-6, Exs. 1 and 3. Compensation later determined that the position merited an SGL of 29, but WSRC states that the next step on the administrative assistant job ladder is 30. Hinton Aff., Para. 8, Ex. 7; Dobyns Aff., Para. 6, Exs. 3-4.

B. RP3 Ranking/Merit Pay Claim

Anderson alleges that she suffered an adverse employment action in the form of an "average" merit increase during 1999 of 3.68%, although her SGL was below the midpoint, based on her "B" RP3 rating for the 1998-1999 evaluation year.[8] She alleges that a white employee in her same department and division, Faye Mellard Williams ("F. Williams"), also received a "B" rating, but was awarded a 4.57% merit increase. WSRC argues that Anderson fails to establish her prima facie case because she fails to show that similarly-situated employees were treated more favorably. Specifically, WSRC argues that Anderson fails to show that F. Williams is a similarly-situated employee because F. Williams had a different job title and was a SGL 29. Further, WSRC asserts that the amount of a merit increase takes into account whether an employee is above or below the midpoint for his or her salary range and grade level (Habasham Dep. 87-89; Lander Aff. at Exs. 5, 12) and that F. Williams earned less money than Anderson both before and after the merit increase and remained below Anderson's median SGL income level.

The undersigned concludes that Anderson fails to establish a prima facie case concerning her 1999 RP3 Ranking and Merit Pay increase fail as she fails to show that F. Williams, or any other similarly-situated employee outside the protected group, was treated more favorably.

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[8] Anderson argues that she should have received an "A" rating, rather than a "B" rating. She fails, however, to show that her performance evaluation alone constitutes an adverse action. *See, e.g., Page v. Bolger*, 645 F.2d 227, 233 (4th Cir.), *cert. denied*, 454 U.S. 892 (1981); *Settle v. Baltimore County*, 34 F. Supp. 969, 1009 (D.Md. 1999) (low performance rating is generally not actionable as an adverse employment action), *aff'd*, 203 F.3d 820 (4th Cir. 1999).

Even if Anderson were able to establish her prima facie case, she fails to show that WSRC's legitimate, non-discriminatory reason for giving F. Williams a higher merit increase (that F. Williams earned less and was further below the midpoint than Anderson both before and after their merit increases) is pretextual.

2. Disparate Impact

Anderson claims that the CBPS had a disparate impact on her in the second stage where certain qualified applicants are selected for an interview, and in the third stage where one or more interviewees are selected for the positions.[9] WSRC argues that Anderson's disparate impact claim fails because: (1) she has not identified the specific employment practice at issue, (2) her expert has failed to establish causation, and (3) she has not set forth an alternative system.[10] Anderson argues that she has established her

[9] Anderson appears to concede that she is unable to establish any other alleged disparate impact claims at this time due to exclusion of other testimony. *See* Plaintiff's Opposition Memorandum, at 27. WSRC appears to concede that Anderson may use the portions of Dr. Edwin L. Bradley's CBPS analysis that pertain to the interview and selection processes. *See* Defendant's Motion for Summary Judgment, at 26.

[10] WSRC also argues that the Fourth Circuit's finding in *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 759-61 (4th Cir. 1998), *vacated on other grounds*, 527 U.S. 1031 (1999) and *aff'd on reh'g*, 206 F.3d 431 (4th Cir. 2000), that "individuals do not have a private, non-class cause of action for pattern or practice discrimination[,]" should be extended to Anderson's individual disparate impact claim. It is recommended that this Court decline to do so at this time, as there is no indication that the Supreme Court or the Fourth Circuit have found that such claims are no longer viable. *See, e.g., Watson v. Fort Worth Bank and Trust*, 487 U.S. 977 (1988); *Davis v. Richmond, Fredericksburg & Potomac R.R. Co.*, 803 F.2d 1322, 1327 n. 3 (4th Cir. 1986) (rejecting a defendant's

(Continued on following page)

prima facie case because she identified the employment practice with enough specificity and has shown enough evidence of causation through statistical studies by Dr. Edwin Bradley, but that WSRC has failed to demonstrate business necessity.

To establish a prima facie-case of disparate-impact discrimination, a plaintiff must (1) identify the specific employment practice being challenged, and (2) show causation. *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 994 (1988). If a plaintiff establishes a prima facie case, the burden then shifts to the employer to produce evidence that the policy is job related and consistent with business necessity. *See id.* at 997-9, *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971). If the employer meets its burden, a plaintiff must show the availability of an alternative practice that would serve the asserted legitimate business needs of the employer without a corresponding prohibited discriminatory effect. *See, e.g., Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659-61 (1989); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).

A. Prima Facie Case

WSRC argues that Anderson fails to allege with specificity her disparate impact claims. Anderson argues that she has identified two specific claims, consisting of two stages in WSRC's CBPS: "the second stage where certain qualified applicants are selected for an interview on a subjective basis, and the third stage where one or more of the interviewees are selected for the positions on a

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contention that a disparate impact theory is not available to an individual plaintiff).

subjective basis." Plaintiff's Opposition Memorandum, at 28.

Anderson fails to establish her prima facie case because she fails to identify the specific employment practice being challenged.[11] Here, Anderson has named the entire process, rather than specifying the "facially neutral standards which result in discriminatory [] practices . . . " *Steward v. Gwaltney of Smithfield*, 954 F. Supp. 1118, 1126 (E.D.Va. 1996). A plaintiff's initial responsibility is to identify and isolate the specific offending employment practice. *Watson* 487 U.S. at 994. Further, a plaintiff cannot use disparate impact theory "to attack the cumulative effects of an employer's practices." *Munoz v. Orr*, 200 F.3d 291, 299 (5th Cir.), *cert. denied*, 531 U.S. 812 (2000). Although processes that are not capable of separation may be analyzed as one employment practice, 42 U.S.C. § 2000e-2(k)(1)(B)(i), Plaintiff has not argued and/or shown that here.

Anderson argues that Dr. Bradley's studies show statistically significant differences between promotions under the CBPS experienced by African-American employees compared to white employees,[12] but she fails to identify

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[11] The cases cited by Plaintiff, *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 292-93 (2d Cir. 1999); *Mozee v. American Commercial Marine Serv. Co.*, 940 F.2d 1036, 1044 (7th Cir. 1991); and *Rose v. Wells Fargo*, 902 F.2d 1417, 1424-25 (9th Cir. 1990), support Anderson's assertion that subjective decisions maybe the subject of disparate impact, but fail to support Anderson's argument that her identified practices are specific enough to prove her prima facie case.

[12] Dr. Bradley states that his studies showed that of the 2,027 qualified candidates selected for an interview, 304 were African-American, but that 387 African-American employees should have been chosen for interviews. He states that this discrepancy represents a difference of -6.64 standard deviations. As to the selection of employees

(Continued on following page)

what process causes such differences. To show causation, a plaintiff must "offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group." *Watson*, 487 U.S. at 994. A plaintiff has to demonstrate that the disparity of which he complains is the result of the employment practice attacked. *Wards Cove Packing Co.*, 490 U.S. at 657. In her opposition memorandum, Anderson appears to argue that selections for interviews and positions occurred because in 96% of the selections the "hiring manager" (or person with final decision-making authority) was a white employee. Even if Plaintiff has identified the subjectivity of the white managers as the challenged employment practice, Dr. Bradley's statistics are not specific enough to show that subjectivity of these managers, in a system where others also have input in the promotion process (HR determines who is minimally qualified, a panel interviews and evaluates interviewees against the posted competencies, the hiring manager with input from the interview panel selects a candidate, and HR and the next level manager review the selection – Lander Aff. at Ex. 15, pp. 12-14), caused the identified differences.

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for the posted positions from those interviewed, Dr. Bradley states that of the 456 candidates selected that 52 were African-American, but that 64 African-American employees should have been chosen from the interviewees. He states that this discrepancy represents a difference of -2.38 standard deviations. Bradley Aff., Section 10.

B. Job Related/Business Necessity/Alternative System

Even if Anderson were to establish her prima facie cases, WSRC has shown that the CBPS system is "job related" and Anderson has not proposed an alternative practice that would serve WSRC's legitimate business needs without a corresponding prohibited discriminatory effect. Anderson argues that WSRC has not met its burden because it has not shown that the challenged business practices are "essential" to the performance of the position in question. WSRC argues that an employer does not have to show that a challenged practice is "essential," but just that the practice is "job related." WSRC argues that "[t]he CBPS System, with carefully defined competencies for each posted position and a multi-stepped review process with built in checks and balances, is designed to select the best qualified individual for each opening, and thus is job-related and plainly permissible." WSRC Motion for Summary Judgment, at 33 (citations omitted).

The Fourth Circuit, since the enactment of the Civil Rights Act of 1991,[13] has not specifically ruled on what

[13] In *Wards Cove*, the Supreme Court held that the burden of persuasion (after a plaintiff established his prima facie case) remained with the plaintiff and the defendant only had the burden of "producing evidence of a business justification for his employment practice." 490 U.S. at 659. The Supreme Court lessened the standard for this "business justification" to a "legitimate employment goal," stating that, "there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business for it to pass muster." *Id.* In enacting the Civil Rights Act of 1991, Congress found, in part, that *Wards Cove* had "weakened the scope and effectiveness of Federal civil rights protections" and appears to have codified the concepts of job relatedness and business necessity as outlined by the Supreme Court in *Griggs*, *supra* and other pre-*Wards Cove* decisions. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, effective November 21, 1991

satisfies the requirements of showing that the questioned policy or practice is "job related for the position in question and consistent with business necessity." A number of courts which have addressed the issue, however, have not required that the practice be essential. *See Bew v. City of Chicago*, 252 F.3d 891, 894 (7th Cir. 2001) (employer must show challenged employment test "bear[s] a demonstrable relationship to successful performance of the jobs for which it was used.") (quoting *Griggs*, 401 U.S. at 431), *cert. denied*, ___ U.S. ___, 122 S.Ct. 545 (2001); *Evers v. Alliant Tech Systems, Inc.*, 241 F.3d 948, 953 & 955 (8th Cir. 2001) (employer showed legitimate business reason defeating plaintiff's prima facie case by demonstrating sharp decline in revenue that necessitated reduction in force); *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1117-1118 & 1119 n. 5 (11th Cir. 1993); *see also Long v. First Union Corp. of Va.*, 894 F. Supp. 933, 940 (E.D. Va. 1995) (employer must show business justification), *aff'd*, 86 F.3d 1151 (4th Cir. 1996); *but see Lanning v. Southeastern Pennsylvania Transp. Auth.*, 181 F.3d 478, 490 (3rd Cir. 1999) (business necessity standards demand that the challenged employment practice be shown to be "necessary for successful performance of the job in question in order to survive a disparate impact challenge.").

Anderson argues that even if WSRC has met its burden, that she has shown the availability of an alternative practice because WSRC was aware of and failed to adopt alternative selection procedures including the recommendation of WSRC's own EEO representative, Machell Mims, that WSRC make every effort to have a diverse panel and that he asked that one candidate be provided with face-to-face feedback as to why that candidate was not selected for an interview. Mims Dep. 50.

Anderson also poses as an alternative a DOE recommendation that WSRC should ensure that "all Interview Panels are diverse" and a proposed "crediting plan" for each position to be implemented before the job is advertised to indicate the quality, quantity, and/or knowledge, skill, or abilities required for each job. DOE Assessment 14-15. Anderson, however, has presented no evidence that these alternatives would result in the selection of the best qualified candidates without a corresponding prohibited discriminatory effect. *See Evers*, 241 F.3d at 954.

CONCLUSION

It is, therefore, recommended that WSRC's motion for summary judgment be granted in accord with the above discussion.

Respectfully submitted,

/s/ Joseph R. McCrorey
Joseph R. McCrorey

August 29, 2002

Columbia, South Carolina

Supreme Court, U.S.
FILED
JAN 17 2006
OFFICE OF THE CLERK

No. 05-616

IN THE

Supreme Court of the United States

VIRGINIA ANDERSON

Petitioner,

v.

WASHINGTON SAVANNAH RIVER COMPANY, LLC; BECHTEL SAVANNAH RIVER INC.; BWXT SAVANNAH RIVER COMPANY; AND BNG AMERICA SAVANNAH RIVER CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, in applying settled law to the facts of record, the court below properly held that Petitioner had not established a triable disparate-impact claim under the Civil Rights Act of 1991 because Petitioner had failed to create a genuine question of material fact about whether a *specific* selection practice used by Respondents *caused* a disparate impact on the basis of race.

CORPORATE DISCLOSURE STATEMENT

Respondents make the following corporate disclosure statements pursuant to Supreme Court Rule 29.6:

Respondent Washington Savannah River Company, LLC (formerly known as Westinghouse Savannah River Company, LLP) is a wholly owned subsidiary of Washington Group International, Inc., a publicly held company No other publicly held company owns 10% or more of Washington Savannah River Company, LLC's stock.

Respondent Bechtel Savannah River Inc. is a wholly owned subsidiary of Bechtel National, Inc., a privately held company. No publicly held company owns 10% or more of Bechtel Savannah River Inc.'s stock.

Respondent BWXT Savannah River Company (formerly known as The Babcock & Wilcox Savannah River Company, Inc.) is a wholly owned subsidiary of BWXT Federal Services, Inc., which is ultimately a wholly owned subsidiary of McDermott International, Inc., a publicly held company. No other publicly held company owns 10% or more of BWXT Savannah River Company's stock.

BNG America Savannah River Corporation (formerly known as British Nuclear Fuels Ltd. Savannah River Corporation) is a wholly owned subsidiary of BNG America, a privately held company. No publicly held company owns 10% or more of BNG America Savannah River Corporation's stock.

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The petition for a writ of certiorari arises out of a controversy that began when Petitioner Virginia Anderson and 98 other named plaintiffs filed a class complaint in 1997 seeking to represent all African-American employees at the United States Department of Energy's Savannah River Site (the "Site"). The Site is managed by Respondent Washington Savannah River Company, LLC with the assistance of Respondents Bechtel Savannah River Inc., BWXT Savannah River Company, and BNG America Savannah River Corporation (collectively, "Respondents"). Pet. App. 5. Of the 99 initial named plaintiffs, all but eight—Anderson and seven others who are presently appealing the grants of summary judgment on their claims to the Fourth Circuit—subsequently settled, dismissed, or otherwise abandoned their claims. In the proceedings below, the Fourth Circuit, like the district court, held that Anderson had failed to make out a triable disparate-impact claim because she did not show that a *specific* employment practice used by Respondents *caused* a disparate impact on the basis of race. Pet. App. 29-31. The Fourth Circuit also unanimously affirmed the district court's grant of summary judgment on Anderson's disparate-treatment claims, rejected her challenges to various evidentiary rulings by the district court, and agreed with the district court that no class had to be certified on the record before the court. Pet. App. 17-50.

A. The Site And The Competency Based Posting System

The Site is a Department of Energy facility that stores and processes radioactive waste and other hazardous waste materials. Pet. App. 5. In May 2000, approximately 13,100 employees worked at the Site for the four Respondents. Joint Appendix in the Fourth Circuit ("J.A.") 2945. At that

time, there were approximately 1,500 managers and supervisors at the Site, and approximately 200 of them were African-American. J.A. 2944.

In the mid-1990's, the Site implemented the Competency Based Posting System ("CBPS"), which Anderson alleges has a disparate-impact on African-American employees. Pet. App. 6. Under the CBPS, the Site posts exempt job openings and invites any employee, exempt or nonexempt, to apply. Pet. App. 7. Each job posting lists both "minimum qualifications" and necessary "core" and "functional" competencies. Pet. App. 10. "Core competencies" are requirements for all jobs—teamwork, leadership, communications, employee development, business results, and self-management. *Id.* Prior to a job posting, the manager with the job opening assigns a weight to each "core competency" in light of the specific job to be filled. *Id.* In addition, the manager identifies specific "functional competencies" unique to the specific job opening and assigns a weight to each. *Id.*

The Site's Human Resources ("HR") Group reviews all applications for completeness, determines which applicants meet the specified minimum qualifications, and forwards to the pertinent manager the application materials for all minimally qualified candidates. Pet. App. 8. The manager, either singly or with the assistance of one or more knowledgeable individuals, then compares the application materials, rates applicants according to the core and functional competencies listed in the job posting, and selects the most qualified candidates for interviews. *Id.*

The manager next forms an interview panel of himself or herself and two other individuals familiar with the job requirements. *Id.* The panel interviews and evaluates the candidates in writing, again based on the core and functional competencies. Pet. App. 8, 10. The manager, aided by the two other panelists, preliminarily identifies the most

qualified candidate, and an HR Lead and the next level of management must approve the manager's preliminary selection decision. Pet. App. 9-10.

Anderson's expert witness, Dr. Edwin L. Bradley, purported to identify a disparity between the percentage of African-American employees who succeeded at each stage of the CBPS and the percentage that he expected to succeed. Pet. App. 29-30. But in making this comparison, Dr. Bradley did not account for any variables besides race and job title. *Id.*; J.A. 8082-92. Nor did he isolate and test which, if any, selection criteria accounted for the disparity, even though such a determination would have been possible because Respondents maintain records of criteria-specific scores assigned to applicants for jobs posted through the CBPS. Pet. App. 30; J.A. 11065-11170, 11187-93. Indeed, Dr. Bradley claimed that he did not even know any of the factors that affected promotion decisions at any of the challenged stages of the CBPS. J.A. 8082-92. Thus, his study merely tested the cumulative effect of all selection criteria at each stage of the CBPS, and did not even attempt to demonstrate that a specific selection criterion caused a disparate impact on African-American employees. Pet. App. 29-31.

B. Virginia Anderson And Her Applications For Promotion

1. Virginia Anderson's Employment History

Petitioner Virginia Anderson began her employment at the Site in May 1978 in the typing pool; she had only an executive secretarial diploma. Pet. App. 5-6. In April 1989, Anderson was promoted to Administrative Secretary, a position with a Salary Grade Level ("SGL") of 16, in the Strategic Materials Technology Department. *Id.*; J.A. 10931-34. In December 1996, Anderson received a bachelor's degree. Pet. App. 6. On her 1997 evaluation, created while she was studying for an M.B.A., Anderson

expressed the goal of being promoted into an exempt position in her related field of study by March 31, 1998. J.A. 10980. Anderson received her M.B.A. in June 1998 and, just over one month later, was promoted to Administrative Assistant, a position with a SGL of 28, in the University Relations Group. Pet. App. 6.

2. Anderson's 1997 Application For Promotion

In late 1997, Anderson and approximately 85 other employees applied for an Administrative Assistant position in the Environmental Restoration Division. Pet. App. 13; J.A. 11062-63, 11065-70. Fifteen interviewees were selected, including Anderson and a white female, Linda Clarke. Pet. App. 13-14. The hiring manager and two other panelists interviewed each candidate. Interview scores ranged from 129.5 to 190: Anderson received the second-lowest interview score of 136; a white employee received the lowest score of 129.5; and Clarke was one of two individuals to receive the highest score of 190. Pet. App. 14. Clarke was deemed the best candidate and was hired at an SGL of 28. Pet. App. 13, 70. The interview panel noted that Clarke "demonstrated [a] very positive attitude," was "very customer focused," and gave "very good examples of processes she had made changes to for consistency or efficiency." J.A. 11080-81.

3. Anderson's 1998 Application For Promotion

Anderson also applied in early 1998 for an Administrative Assistant Position in the Business Development and Community Outreach Division. Pet. App. 14, 39. An interview panel led by the hiring manager, Virginia Wolfe, reviewed applications and gave Anderson a high score on core competencies (only two other people received higher scores), but a low score for functional competencies (eight other people received higher scores). Pet. App. 14, 77; J.A. 11186-95. Based on the relative cumulative scores of the candidates, Anderson was not chosen for an interview. Pet.

App. 14. Rather, the panel interviewed the two applicants with the highest scores and thereafter selected the one who had received the higher score, Brenda Pearson, for the position. Pet. App. 14, 40.

Pearson, who was a Senior Secretary when she applied, had over 24 years of administrative and staff support experience. J.A. 11196-11202. As a secretary reporting to Wolfe, Pearson had already learned the functions of the Administrative Assistant position, which, among other things, included performing marketing communications, doing desktop publishing, preparing technology briefs and brochures, preparing press releases and mailings, responding to Internet inquiries, and performing market research. Pet. App. 40-41; J.A. 11174-79.

In contrast, Anderson had never attended desktop publishing and Internet usage training, and she had never before worked in the Business Development and Community Outreach Division. J.A. 10925-35, 10959-60, 10965-67. In addition, Anderson's application materials "did not reflect capabilities that would match the four areas of functional competencies." J.A. 11181-85.

C. The Decisions Below

As pertinent to the question presented in the petition for a writ of certiorari, the district court granted summary judgment on Anderson's claim that the CBPS had an unlawful disparate-impact. Quoting this Court's opinion in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988), the district court explained that, while subjective employment practices may be challenged under a disparate-impact theory, the "plaintiff's burden . . . goes beyond the need to show that there are statistical disparities." Pet. App. 86. It further explained that plaintiff must also "isolat[e] and identify[y] the specific employment practices that are allegedly responsible for any observed statistical disparities." *Id.* (emphasis omitted). The district court